Office - Supreme Court, U.S.
FILED
AUG 16 1984
ALEXANDER L. STEVAS
CLERK

NO. 84-85

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ELLIS WAYNE FELKER,
Petitioner,

v.

STATE OF GEORGIA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF IN OPPOSITION FOR THE RESPONDENT

WILLIAM B. HILL, JR.
Senior Assistant
Attorney General
Counsel of Record for the Respondent

MICHAEL J. BOWERS
Attorney General

JAMES P. GOOGE, JR.
Executive Assistant
Attorney General

MARION O. GORDON
First Assistant
Attorney General

EDDIE SNELLING, JR.
Senior Attorney

132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3359

52 pp

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1.

Whether this Court should decline to grant a writ of certiorari to examine the Supreme Court of Georgia's determination that evidence of an offense for which the Petitioner was not convicted may be admitted at a subsequent trial if relevant to the issues in the subsequent trial?

2.

Whether this Court should decline to grant a writ of certiorari to examine the Supreme Court of Georgia's determination that the Magistrate who issued warrants for the searches of the Petitioner's residence and automobile was neutral and detached?

3.

Whether this Court should decline to grant a writ of certiorari to examine the Supreme Court of Georgia's determination that the Magistrate who issued the search warrants had a substantial basis for concluding that searches would uncover evidence of wrong doing?

4.

Whether this Court should decline to grant a writ of certiorari to examine the Supreme Court of Georgia's determination that the searches conducted pursuant to valid search warrants were proper?

5.

Whether this Court should decline to grant a writ of certiorari to examine the Supreme Court of Georgia's

determination that the affidavits upon which the search warrants were based did not contain any material inaccuracies or misrepresentations?

6.

Whether this Court should decline to grant a writ of certiorari to examine the Supreme Court of Georgia's determination that the evidence presented at trial was sufficient to support the conviction and sentence imposed upon the Petitioner by the trial jury?

7.

Whether this Court should decline to grant a writ of certiorari to examine the Petitioner's claim that the death penalty cannot be imposed in an even-handed manner in Georgia when Petitioner failed to raise the issue in the state courts of Georgia?

TABLE OF CONTENTS

	Page:
QUESTIONS PRESENTED.....	i,ii,iii
STATEMENT OF THE CASE.....	1
REASONS FOR NOT GRANTING THE WRIT	
A. THE SUPREME COURT OF GEORGIA PROPERLY DETERMINED THAT THE TRIAL COURT DID NOT ERR IN ADMITTING EVIDENCE OF A SIMILAR OFFENSE FOR WHICH THE PETITIONER WAS NOT CONVICTED	11
B. THE SUPREME COURT OF GEORGIA PROPERLY DETERMINED THAT THE MAGISTRATE WHO ISSUED WARRANTS FOR SEARCHES OF THE PETITIONER'S PROPERTY WAS SUFFICIENTLY NEUTRAL AND DETACHED FROM LAW ENFORCEMENT OFFICIALS	20
C. THE SUPREME COURT OF GEORGIA PROPERLY DETERMINED THAT THE WARRANTS ISSUED FOR THE SEARCHES OF PETITIONER'S PROPERTY WERE BASED ON PROBABLE CAUSE	25

D. LAW ENFORCEMENT OFFICIALS PROPERLY SEARCHED THE PETITIONER'S PROPERTY PURSUANT TO THE WARRANTS ISSUED BY THE MAGISTRATE..... 29

E. THE SUPREME COURT PROPERLY DETERMINED THAT THERE WERE NO MATERIAL MISREPRESENTATIONS IN THE AFFIDAVITS PRESENTED TO THE MAGISTRATE..... 33

F. THE EVIDENCE PRESENTED AT TRIAL WAS SUFFICIENT FOR ANY RATIONAL TRIER OF FACT TO FIND THE PETITIONER GUILTY OF THE CRIMES CHARGED.. 36

G. PETITIONER DID NOT PROPERLY PRESENT HIS CONTENTION THAT JURIES ARE MORE INCLINED TO VOTE FOR THE DEATH PENALTY WHEN THE VICTIM IS WHITE THAN WHEN THE VICTIM IS NON-WHITE TO THE STATE COURTS IN GEORGIA..... 39

CONCLUSION..... 41

CERTIFICATE OF SERVICE..... 43

TABLE OF AUTHORITIES

	Page(s)
Aguilar v. Texas, 378 U.S. 108 (1964).....	28
Allen v. State, 240 Ga. 567, 242 S.E.2d 61 (1978)	22
Cardinale v. Louisiana, 394 U. S. 437 (1969).....	40
Cash v. State, 222 Ga. 55, 148 S.E.2d 420 (1966).....	30
Connally v. Georgia, 429 U.S. 245 (1977).....	21,22
Devier v. State, 247 Ga. 635, 277 S.E.2d 729 (1981).....	27
Felker v. State, 144 Ga. App. 458, 241 S.E.2d 576 (1978).....	12
Felker v. State, 252 Ga. 351, ___ S.E.2d ___ (1984).....	passim

Illinois v. Gates,
___ U.S. ___,
103 S.Ct. 2317,
76 L.Ed. 2d 527 (1983)..... 26,28

Jackson v. Virginia,
443 U.S. 307 (1979)..... 38

Jarvis v. Rubiano,
244 Ga. 735, 261 S.E.2d 645
(1979)..... 30

McClesky v. Zant,
580 F.Supp. 338
(N.D.Ga. 1984)..... 40

Pass v. State,
227 Ga. 730, 182 S.E.2d 779
(1971)..... 30

Pollock v. State,
162 Ga. App. 757(1),
293 S.E.2d 38 (1982)..... 18

Smith v. Wainwright,
568 F.2d 362
(5th Cir. 1978)..... passim

State v. Johnson,
246 Ga. 654, 272 S.E.2d 321
(1980)..... 18

Taylor v. State,
174 Ga. 52, 162 S.E. 504
(1931)..... 16,17

Texas v. Brown,
___ U.S. ___,
103 S.Ct. 1535,
75 L.Ed. 2d 502 (1983)..... 31

United States v. Chester,
537 F.2d 173
(5th Cir. 1976)..... 27

United States v. Ross,
456 U.S. 798 (1982)..... 30

Ward v. State,
234 Ga. 882, 218 S.E2d 591 27
(1975).....

Wingate v. Wainwright,
464 F.2d 209
(5th Cir. 1972)..... 12,13

Statutes Cited: Page:

O.C.G.A. § 15-10-14;
Ga. Code Ann. § 24-1601.... 22

NO. 84-85

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

ELLIS WAYNE FELKER,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF IN OPPOSITION FOR THE RESPONDENT

PART ONE

STATEMENT OF THE CASE

The Petitioner, Ellis Wayne Felker, was found guilty of murder, rape, aggravated sodomy, and false

imprisonment after a trial by jury in Houston County, Georgia. A separate proceeding was held to determine what sentence would be imposed for the murder conviction. The trial jury found two statutory aggravating circumstances and sentenced the Petitioner to death for murder. (R. 1612-1613; T. 1305). The trial court sentenced the Petitioner to life for rape, twenty years for aggravated sodomy, and ten years for false imprisonment. (R. 1614-1616). Petitioner's Amended Motion for New Trial was denied on July 20, 1983. Petitioner then appealed his conviction and sentence to the Supreme Court of Georgia. Felker v. State, 252 Ga. 351, ___ S.E.2d ___ (1984). After considering all the Petitioner's

enumerated errors, and after reviewing the transcript of proceedings pursuant to the Unified Appeal Procedure, the Supreme Court of Georgia affirmed the convictions and sentences on March 15, 1984. Petitioner's motion for rehearing was denied March 29, 1984. Thereafter, Petitioner filed this petition for a writ of certiorari in this Court.

The facts of the case, as established by the evidence at trial and reiterated on direct appeal by the Supreme Court of Georgia, are as follows: Evelyn Joy Ludlam, a nineteen year old junior college student was employed as a cocktail waitress in Warner Robins, Georgia in November, 1981. Joy was not satisfied with her job as a cocktail waitress

because of her religious beliefs and had actively begun to seek other employment. While working as a cocktail waitress, Joy met the Petitioner, Ellis Wayne Felker, on Monday evening, November 23, 1981. The Petitioner was wearing a T-shirt which advertised, "The Leather Shoppe," a business that he owned. Joy talked with the Petitioner about the shop for awhile and then the conversation focused on the Petitioner's need for a seamstress. At trial, witnesses testified that Joy stated that the Petitioner offered to pay $200.00 a week for a seamstress. The Petitioner discussed the possibility of employment with Joy even though his "Leather Shoppe" had not operated regularly for months, the

electricity at the shop had been disconnected, and he was overdrawn on his account at the bank. In addition to admitting his poor financial state and his lack of work activity, Petitioner admitted discussing a job opportunity with Joy even though his present girlfriend, was looking for a job and was a qualified seamstress. (T. 873, 916-917, 919).

Joy visited the Petitioner's residence twice on November 24, 1981. The first visit was in the morning. Joy returned home after not being able to see the Petitioner's shop. That evening, Joy again visited the Petitioner. She made a call from the Petitioner's residence which resulting in her having the night off from her job. Joy was never again seen alive.

The next day the lady with whom Joy lived reported her missing. Police officers went to the Petitioner's residence because he was the last person known to have seen her. While talking to the officers, the Petitioner stated that he had opened and closed Joy's car door for her, but that he never got into her car, nor had she gotten into his car. Felker v. State, supra at 353.

Joy's mother searched for her daughter, and found her daughter's locked car in a parking lot of a bank in Warner Robins. After the police opened the car and searched it, they found a note stating, "I'm going to Atlanta to eat dinner with Wayne and some of his friends. They are GS-11's

on base. Joy." (T. 515). Felker v. State, supra at 353.

On the Tuesday following Joy's disappearance, before authorities knew what had happened to Joy, Petitioner gathered and threw away bondage equipment that he owned and discussed a possible false alibi with his girlfriend concerning his whereabouts when Joy disappeared. (T. 850-852). Petitioner took these measures even though no one knew Joy's whereabouts, if she were dead, or if bondage equipment had been used on her. (T. 855-856, 869).

Two weeks after she disappeared, Joy's body was discovered in a creek outside of Warner Robins, Georgia. An autopsy was conducted in which the medical examiner found evidence that

Joy had been bound, gagged, beaten, forcibly raped and sodomized. Felker v. State, supra at 353-354. The medical examiner tetified that Joy died as a result of asphyxiation. (T. 335). Although establishing time of death proved difficult due to the circumstances surrounding the murder, the medical examiner testified that Joy could have been dead for two weeks prior to the time she was discovered.

Hair and fiber evidence seized from the Petitioner's residence, car and business were transported to the State Crime Lab and analyzed. Fibers found on Joy's coat were consistent with fibers present in the Petitioner's residence. Hairs found on the victim's clothes, including her underclothes, were consistent with

Petitioner's head hairs. The hair and fiber evidence indicated that Joy had been in Petitioner's car, contrary to the Petitioner's statement.

In addition to testimony of witnesses, admissions by the Petitioner, physical evidence, and scientific analysis of hair and fiber evidence, the State presented evidence of an earlier similar incident committed by the Petitioner. The State was able to demonstrate at least eighteen similarities between the earlier incident and the instant case. After considering all the evidence presented by the State, the jury, as stated earlier, convicted the Petitioner of murder, rape, aggravated sodomy and false imprisonment.

Further facts may be developed herein as necessary for a more thorough illumination of the issues presented to this Court.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

A. THE SUPREME COURT OF GEORGIA PROPERLY DETERMINED THAT THE TRIAL COURT DID NOT ERR IN ADMITTING EVIDENCE OF A SIMILAR OFFENSE FOR WHICH THE PETITIONER WAS NOT CONVICTED.

The Petitioner contends that the trial court improperly admitted evidence of a similar offense for which the Petitioner was not found guilty. Respondent asserts that the Supreme Court of Georgia properly held that the trial court did not err by admitting evidence of the extrinsic crime.

Petitioner was previously indicted for rape and aggravated sodomy. After a trial by jury, the Petitioner was convicted of aggravated sodomy. He was not convicted of rape. Felker v. State, 144 Ga. App. 458, 241 S.E.2d 576 (1978). At trial, the State demonstrated at least eighteen distinct similarities between the prior crime and the instant offense. (T. 1091-1092). Petitioner contends that because he was not found guilty of rape, but was only found guilty of aggravated sodomy, the victim of the prior offense should not have been allowed to testify that the Petitioner raped her.

Petitioner relies upon Wingate v. Wainwright, 464 F.2d 209 (5th Cir. 1972), to support his contentions.

The decision in Wingate v. Wainwright has been construed by the Court of Appeals in a later case. In Smith v. Wainwright, 568 F.2d 362 (5th Cir. 1978), a defendant was separately tried for breaking and entering and rape. Testimony of the alleged rape was admitted at his trial for breaking and entering for which he was eventually convicted. Subsequently, he was acquitted of the rape charge. On habeas review, the defendant contended that because he was acquitted of rape, testimony concerning the rape should not have been heard at his breaking and entering trial. Although the order of convictions is reversed, the reasoning of the Court of Appeals in Smith v Wainwright is applicable to this

case. The Court of Appeals reasoned that evidence of the rape was not admitted to show bad character but was simply admitted under a category the court termed "other acts" evidence which tended to identify the defendant as the perpetrator of the subsequent crime. Smith v. Wainwright, supra at 363-364. Accordingly, admission of evidence concerning "other acts" as opposed to other crimes, which evidence is relevant and identifies the defendant as the perpetrator of the subsequent crime is not prohibited by the Court of Appeals of this

Circuit.[1]

The panel decision in Albert v. Montgomery, 732 F.23d 865 (11th Cir. 1984) is inapplicable to the facts of this case. In Albert, the court held that evidence of a prior offense could not be admitted at a subsequent trial because at the prior trial identity was at issue and the jury found that the defendant was not the perpetrator of the crime. In the instant case identity was not at issue, at issue was whether the Petitioner committed all the elements of the crime. There

---

[1]Decisions of the Fifth Circuit Court of Appeals prior to September 30, 1981 are binding on the Eleventh Circuit Court of Appeals. Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981).

was no doubt that the Petitioner committed the prior offense as evidenced by the jury's verdict. Additionally, as the Supreme Court of Georgia stated, "The relevance of the 1976 offense does not hinge on whether appellant committed all of the elements of the offense of rape. Thus, it is not the case that 'some issue necessary for the prosecution's case in the second trial has necessarily been found for the defendant in the first trial.'" Felker v. State, supra at 362.

It has long been the law in the State of Georgia that acquittal of a prior crime does not bar the admissibility of testimony as to that act in a subsequent proceeding. See Taylor v. State, 174 Ga. 52, 162

S.E.2d 504 (1931). The Supreme Court of Georgia has continued to follow the doctrine because acquittal does not mean that a defendant did not commit the prior acts.

> [Appellant's] acquittal on that charge does not establish as a matter of law for any purpose that the [victim] was untruthful in stating that Appellant committed the acts, nor does his acquittal necessarily as a matter of law belie any other evidence offered against him at that earlier trial. His acquittal merely establishes that the State had merely failed to prove his guilt of the crime beyond

a reasonable doubt according to legal standards.

Pollock v. State, 162 Ga. App. 757(1), 293 S.E.2d 38 (1982) citing State v.Johnson, 246 Ga. 654, 655, 272 S.E.2d 321 (1980). Accordingly, acquittal of an offense does not necessarily mean that a defendant did not commit the acts charged against him.

The Supreme Court of Georgia properly followed Georgia law in determing that the trial court properly admitted evidence of the extrinsic crime at Petitioner's trial. Additionally, as shown above, the Court of Appeals in this Circuit has stated that evidence of "other acts" of a defendant may be admissible at trial if relevant. Smith v.

Wainwright, supra. Because the Supreme Court of Georgia properly followed Georgia law, and because the reasoning in the Supreme Court of Georgia's decision and the Court of Appeal's decision is sound considering that a not guilty verdict does not mean that a defendant is innocent Petitioner's allegation does not present any issue for review by this Court.

B. THE SUPREME COURT OF GEORGIA PROPERLY DETERMINED THAT THE MAGISTRATE WHO ISSUED WARRANTS FOR SEARCHES OF THE PETITIONER'S PROPERTY WAS SUFFICIENTLY NEUTRAL AND DETACHED FROM LAW ENFORCEMENT OFFICIALS.

Petitioner contends that the Georgia Supreme Court improperly determined that the Magistrate who issued the warrants for searches of the Petitioner's property was neutral and detached. Petitioner contends that as the Magistrate only billed the County for warrants he issued, he was neither neutral nor detached according

to the guidelines established in Connally v. Georgia, 429 U.S. 245 (1977). Respondent asserts that the Magistrate was neutral and detached pursuant to Connally v. Georgia, and that the Magistrate's voluntary billing policies were not improper.

In Connally v. Georgia, this Court found that the Georgia system for issuing search warrants was defective because a fee was authorized for warrants issued, while a fee was not authorized for warrants denied. Connally v. Georgia, supra at 250. As the Supreme Court of Georgia points out in its decision, the Georgia law was amended in 1977 in response to Connally v. Georgia. Presently, Magistrates may collect a fee whether they grant or deny an application for

an arrest or search warrant. O.C.G.A. § 15-10-14; Ga. Code Ann. § 24-1601. Felker v. State, 252 Ga. 351, 372 (1984); Allen v. State, 240 Ga. 567 (1978).

The facts of the instant case reveal that although the Magistrate was authorized to bill the County for warrant applications that he denied, the Magistrate voluntarily chose not to bill the County. Connally v. Georgia did not require that officers inquire into the billing habits of Magistrates, only that Magistrates could not be statutorily authorized to collect fees only when warrants were issued.

Finally, Respondent notes that Petitioner also asserts the Magistrate was not neutral and detached because

of the setting in which the search warrants were issued. In support of his argument, Petitioner asserts that on occasion, the Magistrate issued warrants at the police office rather than having the police come to his office. Petitioner seeks to transform a simply matter of small town convenience into constitutionally impermissible intermingling. Respondent submits that the place where the Magistrate issues the warrants is of no significance; the Magistrate need only be neutral and detached from the law enforcement mechanism. In this case, the Magistrate thoroughly reviewed the affidavits and considered all relevant testimony before issuing warrants, and was neutral and detached. During

pretrial hearings, the Magistrate so testified. (Transcript of pretrial proceedings, page 197). Accordingly, Respondent respectfully asserts that Petitioner's allegation does not present any issue for review by this Court.

C. THE SUPREME COURT OF GEORGIA PROPERLY DETERMINED THAT THE WARRANTS ISSUED FOR THE SEARCHES OF PETITIONER'S PROPERTY WERE BASED ON SUFFICIENT PROBABLE CAUSE.

Petitioner contends that the Supreme Court of Georgia improperly determined that the warrants issued for searches of the Petitioner's property were based on probable cause. Respondent contends that sufficient information was provided to the Magistrate prior to the warrants being issued.

Traditionally, the standard for reviewing an issuing Magistrate's

probable cause determination has been that the determination will stand so long as the Magistrate had a substantial basis for concluding that a search would uncover evidence of wrongdoing. Illinois v. Gates, ___ U.S. ___, 103 S.Ct. 2317, 76 L.Ed. 2d 527 (1983). In the instant case, the Supreme Court of Georgia found that the affidavits upon which the Magistrate based his determinations were perhaps not perfect, however they did not contain any material inaccuracies and were sufficient to support the issuance of warrants. The Supreme Court of Georgia noted that Magistrates considering the issuance of warrants are not to be confined by restrictions on the use of their common sense. Felker v. State, supra

at 371, citing United States v. Chester, 537 F.2d 173, 175 (5th Cir. 1976). Mizerly limitations will not be placed on the Magistrate's determination because probable cause does not involve certainty, but mere probability. See Ward v. State, 234 Ga. 882, 218 S.E.2d 591 (1975). See also Devier v. State, 247 Ga. 635, 637, 277 S.E.2d 379 (1981).

In the instant case, the Supreme Court of Georgia found that several warrants were issued for searches of the Petitioner's property because officers sought different things from different locations on each occasion. Felker v. State, supra at 369-371. After reviewing the affidavits in question, the Supreme Court found that the information contained within them

was sufficient to support the issuance of the warrants. Considering that the Magistrate did have a substantial basis for concluding that searches would uncover evidence of wrongdoing, Felker v. State, supra at 369, this Court should give great deference to the Supreme Court of Georgia's determination that the Magistrates's issuance of the warrants was proper. Illinois v. Gates, supra; Aguilar v. Texas, 378 U.S. 108 (1964). Accordingly, Respondent respectfully asserts that the Petitioner's allegation does not present any issue for review by this Court.

D. LAW ENFORCEMENT OFFICIALS PROPERLY SEARCHED THE PETITIONER'S PROPERTY PURSUANT TO THE WARRANTS ISSUED BY THE MAGISTRATE.

Petitioner contends that law enforcement officials impermissibly conducted general searches pursuant to the warrants issued by the Magistrate. In support of his contention, Petitioner alleges that lewd drawings in the Petitioner's possession were improperly seized by officers. Respondent contends that the officers were properly on the residence and only seized those items which were tangible evidence of the commission of a crime.

Although an officer may not rummage for evidence of a crime, the fact that the officer seizes items not named in the search warrant does not render the search invalid or unlawful. Jarvis v. Rubiano, 244 Ga. 735, 261 S.E.2d 645 (1979); Pass v. State, 227 Ga. 730, 183 S.E.2d 779 (1971). Items not named in the warrant may be seized because during a lawful search officers have a right to open any container that can reasonably hold the things being sought. See United States v. Ross, 456 U.S. 798 (1982); Cash v. State, 222 Ga. 55, 148 S.E.2d 420 (1966). Additionally, this Court has recently stated that it is not necessary that items seized under the plain view doctrine be

contraband. Texas v. Brown, ___ U.S. ___, 103 S.Ct. 1535, 1542, 75 L.Ed. 2d 502 (1983). In the instant case, the Supreme Court of Georgia properly determined that officers did not conduct a general search, but rather searched pursuant to a lawful warrant and only seized tangible evidence of the commission of a crime. Felker v. State, supra at 371.

Pursuant to their authorization, officers searched the Petitioner's property and found envelopes at both the Petitioner's house, and at his place of business. In the envelopes, they found lewd drawings of women in bondage. The drawings also depicted cocktail waitresses (the present victim, and a prior victim were both cocktail waitresses), and one of the

drawings bore a remarkable resemblance to the present victim. Considering that the officers lawfully searched the envelopes which could have contained items particularly named in search warrants, Felker v. State, supra at 369-370, and considering that the evidence contained therein, especially the drawing bearing a resemblance to the victim, were tangible evidence of the commission of a crime, the officers did not improperly seize any items introduced at trial. Accordingly, Respondent respectfully asserts that Petitioner's allegation does not present any issue for review by this Court.

E. THE SUPREME COURT PROPERLY DETERMINED THAT THERE WERE NO MATERIAL MISREPRESENTATIONS IN THE AFFIDAVITS PRESENTED TO THE MAGISTRATE.

Petitioner contends that material information was withheld from the Magistrate when law enforcement officials sought the issuance of warrants. Petitioner alleges that two members of the community reported seeing the victim alive after the time when the victim was last seen with Petitioner. Respondent contends that the Magistrate was provided with all material information germane to the issuance of the warrants.

At trial, Appellant sought to elicit testimony from witnesses which would indicate that the victim was alive after being seen with the Petitioner; however, no witness was able to state what day they saw the victim, or whether it was actually the victim. (T. 737, 741-742, 746, 747, 751-755, 758, 935). Petitioner feels that since he was able to secure witnesses who would testify that they may have seen someone who looked somewhat like the victim on a day somewhere near the time when the victim disappeared, this Court should hold that the information on which the warrants was based was false. Petitioner's contentions are based primarily on his theory of the case rather than on the facts and

circumstances surrounding the case. Because officers were not required to present to the Magistrate issuing search warrants Petitioner's theory of the case, especially when his theory is based wholly upon speculation and conjecture, the Supreme Court of Georgia properly determined that there were no misrepresentations associated with the affidavits presented to the Magistrate. Felker v. State, supra at 371. Accordingly, Respondent respectfully asserts that Petitioner's contention does not present any issue for review by this Court.

F. THE EVIDENCE PRESENTED AT TRIAL WAS SUFFICIENT FOR ANY RATIONAL TRIER OF FACT TO FIND THE PETITIONER GUILTY OF THE CRIMES CHARGED.

Petitioner contends that the evidence presented at trial was insufficient to support the jury's verdict. Respondent contends that evidence presented at trial, including scientific analysis of hair and fiber evidence, testimony of expert witnesses, admissions by the Petitioner, physical evidence, and testimony from a prior victim was sufficient to allow the jury to find the Petitioner guilty beyond a reasonable doubt.

The evidence presented to the jury is clearly and succinctly set forth in the Supreme Court of Georgia's opinion. Felker v. State, 252 Ga. 351, 351-359 (1984). The evidence outlined demonstrates that the Petitioner lured the victim to his home, tricked her into believing that she was to have dinner with he and his friends, then bound, raped, sodomized, and murdered the victim. After the murder, Petitioner lied to the police about whether the victim had ever been in his car; Petitioner's story changed when hair and fiber evidence was introduced at trial. Additionally, prior to the victim being found, the Petitioner threw away bondage equipment that he used on the victim and sought to concoct a false abili.

Lastly, when questioned about where he was the night the victim disappeared, Petitioner contended that he went out driving around the area looking for his girlfriend who would, supposedly, be standing outside in someone's yard during the early hours of the morning. Respondent contends, and the Supreme Court of Georgia found after a review of all evidence presented at trial, that the jury was authorized to find the Petitioner guilty beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307 (1979); Felker v. State, supra at 368-369. Accordingly, Respondent respectfully asserts that Petitioner's allegation does not present any issue for review by this Court.

G. PETITIONER DID NOT PROPERLY PRESENT HIS CONTENTION THAT JURIES ARE MORE INCLINED TO VOTE FOR THE DEATH PENALTY WHEN THE VICTIM IS WHITE THAN WHEN THE VICTIM IS NON-WHITE TO THIS COURT.

In Petitioner's last allegation, he contends that the death penalty in Georgia cannot be imposed even-handedly because juries are more inclined to vote for the death penalty when the victim is white than when the victim is non-white. Petitioner did not raise this contention prior to trial, at trial, or on appeal. This Court has stated that when a federal

question has never been raised, preserved, or passed upon in the state courts, this Court will not decide the issue for the first time on review of the state court decisions. Cardinale v. Louisiana, 394 U. S. 437 (1969). Accordingly, Respondent respectfully asserts that Petitioner's allegation does not present any issue for review by this Court.[2]

---

[2]Respondent notes that in this allegation, Petitioner relies upon McClesky v. Zant, 580 F.Supp. 338 (N.D. Ga. 1984). However, the district court in McClesky v. Zant found that there was no evidence that the death penalty was not applied in an even-handed manner in Georgia.

CONCLUSION

This Court should refuse to grant a writ of certiorari to the Supreme Court of Georgia, as it is manifest that either there exists no federal question for review by this Court and, further, there is no substantial federal question not previously decided by this Court. Additionally, the decision sought to be reviewed is demonstrably in accord with applicable decisions of this Court.

Respectfully submitted,

William B. Hill, Jr.
WILLIAM B. HILL, JR.
Senior Assistant
Attorney General
Counsel of Record
for Respondent

MICHAEL J. BOWERS
Attorney General

JAMES P. GOOGE, JR.
Executive Assistant
Attorney General

MARION O. GORDON
First Assistant
Attorney General

EDDIE SNELLING, JR.
Senior Attorney

132 State Judicial Building
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3359

CERTIFICATE OF SERVICE

I, WILLIAM B. HILL, JR., a member of the bar of the Supreme Court of the United States and counsel of record for the Respondent, hereby certify that in accordance with the rules of the Supreme Court of the United States, I have this day served a true and correct copy of this Brief in Opposition for the Respondent upon the Petitioner by depositing three copies of same in the United States mail with proper address and adequate postage to:

S. Phillip Brown
Counsel of Record for Petitioner
355 Cotton Avenue
Macon, Georgia 31201

This 31st day of August, 1984.

William B. Hill, Jr.

WILLIAM B. HILL, JR.
Senior Assistant
Attorney General